

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2014 IL App (3d) 120408-U

Order filed December 19, 2013
Modified upon denial of rehearing January 23, 2014

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2014

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from the Circuit Court
) of the 9th Judicial Circuit,
Plaintiff-Appellee,) Knox County, Illinois,
)
v.) Appeal No. 3-12-0408
) Circuit No. 09-CF-602
JOSEPH L. VILLARREAL,)
) Honorable
Defendant-Appellant.) James B. Stewart,
) Judge, Presiding.

PRESIDING JUSTICE LYTTON delivered the judgment of the court.
Justices Wright and Holdridge concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The complaint for warrant provided a substantial basis for the trial court to find probable cause; and (2) trial court's consideration at sentencing of aggravating factors inherent in defendant's offense did not justify reversal under the plain error doctrine.
- ¶ 2 On September 18, 2009, a search warrant was executed on the home of defendant, Joseph L. Villarreal. As a result of evidence found therein, defendant was charged with four offenses: (1) unlawful possession with intent to deliver a controlled substance (cocaine) (720 ILCS

570/401(a)(2)(A) (West 2008)); (2) unlawful possession of a controlled substance (cocaine) (720 ILCS 570/402(a)(2)(A) (West 2008)); (3) unlawful possession with intent to deliver cannabis (720 ILCS 550/5(d) (West 2008)); and (4) unlawful possession of cannabis (720 ILCS 550/4(d) (West 2008)). Prior to trial, defendant challenged the validity of the search warrant. The court denied the challenge. After a stipulated bench trial, the court found defendant guilty on all four counts. The court dismissed two of the counts and sentenced defendant to concurrent terms of 10 and 5 years' imprisonment on the remaining counts. On appeal, defendant claims that the complaint for the search warrant (complaint) did not establish probable cause and that the court relied on improper aggravating factors during sentencing. We affirm.

¶ 3 FACTS

¶ 4 Galesburg police executed a search warrant for defendant's home and found approximately 34.7 grams of cocaine and 352.9 grams of cannabis. Defendant was charged with unlawful possession with intent to deliver a controlled substance (cocaine) (count I) (720 ILCS 570/401(a)(2)(A) (West 2008)); unlawful possession of a controlled substance (cocaine) (count II) (720 ILCS 570/402(a)(2)(A) (West 2008)); unlawful possession with intent to deliver cannabis (count III) (720 ILCS 550/5(d) (West 2008)); and unlawful possession of cannabis (count IV) (720 ILCS 550/4(d) (West 2008)).

¶ 5 Prior to trial, defendant filed a motion pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), claiming that the complaint contained false statements by its affiant, Galesburg Police Detective Kevin Legate. The court heard and denied the motion. Defendant filed a motion to suppress, claiming that the complaint did not establish probable cause to search defendant's home. At a hearing on that motion, the State moved to strike, arguing that the court's earlier denial of the

Franks motion was *res judicata* of the motion to suppress. The court granted the motion to strike, predicting that the arguments would mirror those made on the previously decided *Franks* motion.

¶ 6 The cause proceeded to a stipulated bench trial. The parties stipulated that a search of defendant's residence revealed 34.7 grams of a substance testing positive for cocaine and 352.9 grams of a substance testing positive for cannabis. Defendant admitted that the substances were his. Also found in the residence were several items associated with the distribution of cocaine and cannabis. The court found defendant guilty on counts I and III and dismissed counts II and IV.

¶ 7 The cause proceeded to sentencing. The sentencing range for defendant's conviction on count 1 was normally 6 to 30 years' imprisonment; however, the parties agreed on a sentencing cap of 11 years. 720 ILCS 570/401(a)(2)(A) (West 2008). The court considered factors in aggravation and mitigation. In aggravation, the court found that: (1) defendant's conduct caused or threatened serious harm; (2) defendant received compensation for committing the offense; (3) defendant had a history of prior delinquency or criminal activity; and (4) the sentence was necessary to deter others from committing the same crime. See 730 ILCS 5/5-5-3.2(a)(1), (2), (3), (7) (West 2008). The court noted that it considered factors one and four the most important. In mitigation, the court found that: (1) defendant did not contemplate that his criminal conduct would cause or threaten serious physical harm to another; and (2) the character and attitudes of defendant indicated that he was unlikely to commit another crime. See 730 ILCS 5/5-5-3.1(a)(2), (9) (West 2008). The court sentenced defendant to concurrent sentences of 10 years' imprisonment on count I and 5 years' imprisonment on count III.

¶ 8 Defendant appeals, arguing: (1) the court erred in granting the State's motion to strike the motion to suppress; and (2) the court improperly considered factors in aggravation that were implicit

in defendant's offenses.

¶ 9

ANALYSIS

¶ 10

A. Motion to Suppress

¶ 11 Defendant argues the court erred when it granted the State's motion to strike the motion to suppress.

¶ 12 The trial court refused to address the motion to suppress, finding that its earlier ruling on the *Franks* motion made consideration of the motion to suppress unnecessary. On appeal, the State concedes that the two motions raised separate issues and that the trial court should have addressed the motion to suppress. See *People v. Sutherland*, 223 Ill. 2d 187 (2006).

¶ 13 Typically, when reviewing a trial court's decision on a motion to suppress, we uphold the trial court's factual findings unless they are against the manifest weight of the evidence but review *de novo* the trial court's ultimate decision on whether suppression is warranted. *People v. Luedemann*, 222 Ill. 2d 530 (2006). However, the present case requires an alternative standard of review. In reviewing a motion to suppress that challenges whether a warrant should have issued, "this court's task is to focus on the court's initial determination of probable cause, as opposed to the trial court's review of that determination." *People v. Smith*, 372 Ill. App. 3d 179, 181-82 (2007). A court's decision to issue a warrant should be upheld so long as it had a substantial basis for finding probable cause. *Illinois v. Gates*, 462 U.S. 213 (1983).

¶ 14 Our supreme court elaborated in *Sutherland*:

"Affidavits must be viewed in a 'commonsense,' not a 'hypertechnical,' manner.

[Citations.] Our function as the reviewing court is not to substitute our judgment for that of the issuing magistrate but, rather, to ensure that the magistrate had a substantial basis for

concluding that probable cause existed. [Citations.] Probable cause for a search warrant exists where ' "given all the circumstances set forth in the affidavit *** there is a fair probability that contraband or evidence of a crime will be found in a particular place." ' [Citations.]" *Sutherland*, 223 Ill. 2d at 219.

Our task, then, is to determine whether the judge who issued the warrant had a substantial basis for finding probable cause.

¶ 15 In the complaint, Legate swore that in the past four months, police had conducted nine controlled buys of cocaine. The ninth buy occurred within 72 hours of the complaint being filed. Only three of the nine buys were detailed in the complaint. During one of those buys, defendant's brother, Michael Villareal, delivered cocaine to an unwitting source, who then delivered it to a confidential source working with investigators. After the delivery, officers stopped Michael and recovered 6.2 grams of cocaine in his possession. The cocaine was packaged in different weights, indicating to officers that the cocaine was intended for sale.

¶ 16 During another controlled buy, Michael left his residence and traveled to a home where he received \$360 from an unwitting source, which had been given to the unwitting source by a confidential source working with investigators. Michael returned home. Shortly afterward, defendant arrived at Michael's residence. Defendant went home, and Michael returned to the unwitting source's location and delivered cocaine to the unwitting source, who delivered it to the confidential source.

¶ 17 During the purchase that occurred within 72 hours of filing the complaint, Michael traveled to a location where an unwitting source and the same confidential source were located. Michael received \$550 from the unwitting source, which had been given to the unwitting source by the

confidential source. Michael then traveled to defendant's residence and went inside. Defendant's red minivan was parked in the driveway. Michael exited defendant's house and traveled back to his residence before returning to the sources' location. The confidential source witnessed Michael deliver cocaine to the unwitting source, who then delivered it to the confidential source. The complaint averred that the confidential source was reliable because he or she had conducted numerous controlled buys in the past that had led to felony arrests and drug seizures.

¶ 18 In addition to describing the controlled buys, the complaint swore that a different confidential source had provided investigators with information that he or she had purchased cocaine and cannabis from defendant at least 10 times. The source stated that defendant would sometimes send his brother Michael to complete the drug deliveries. The source said that he or she had been to defendant's residence at least four times, most recently seven months prior to the filing of the complaint. During that visit to defendant's residence, the source observed a glass mason jar filled with cocaine and approximately two pounds of cannabis in a desk drawer. No additional facts were included in the complaint to establish the reliability of this confidential source.

¶ 19 We find that the facts sworn to in the affidavit gave the trial court a substantial basis for finding probable cause. The facts in the complaint tend to establish that defendant and his brother were partners in a narcotics business. The facts clearly establish probable cause that Michael had committed a crime by delivering cocaine on three occasions. Two of those purchases involved Michael meeting with defendant immediately after receiving money to purchase cocaine. The logical assumption would be that, after receiving the money for the cocaine, Michael was going to get the cocaine and bring it back to the buyer. As defendant notes, associating with one's brother is not inherently suspicious. However, meeting one's brother immediately after one has been given money

for narcotics, and immediately before one delivers those narcotics, is suspicious and is probative of the fact that defendant delivered the narcotics to Michael.

¶ 20 Only one of the two detailed buys involved defendant's residence, the place specified to be searched. However, the connection of the narcotics dealing to defendant's residence is supported by the information received from a confidential source that defendant had sold narcotics to the source on 10 occasions and that the source had observed cocaine and cannabis at defendant's residence within the past year.

¶ 21 The complaint includes minimal facts establishing the source's reliability. Some reliability can be inferred from the source's statement that Michael would often deliver cocaine on behalf of defendant. That statement is supported by the controlled buys. Although other facts to establish the source's reliability are lacking, reliability of an informant is merely one factor among many that informs the overall inquiry of whether the complaint establishes probable cause. *Smith*, 372 Ill. App. 3d 179. Considering the unknown reliability of the source in conjunction with all the other facts, we find that the facts in the complaint were sufficient to establish a substantial basis for the trial court to find probable cause.

¶ 22 Defendant argues that the facts in the complaint were stale. A warrant is stale when too much time has elapsed between the facts alleged in the complaint and the issuance of the warrant. *People v. Donath*, 357 Ill. App. 3d 57 (2005). However, there is no particular number of days or weeks beyond which probable cause ceases to exist. *Id.* The lack of a rigid rule allows the court to exercise his informed judgment. *Id.* The single most important factor in determining whether probable cause exists is whether the defendant engaged in a continuing course of conduct. *Id.*

¶ 23 The controlled buys and the source's statement establish a substantial basis that Michael and

defendant were engaged in a continuing course of conduct. In addition, one of the controlled buys, which involved defendant's residence, occurred within 72 hours of the filing of the complaint. Under these circumstances the complaint was not stale, and the issuing court had a substantial basis for finding probable cause.

¶ 24

B. Sentencing

¶ 25 Defendant argues that the cause should be remanded for resentencing because the trial court considered two improper factors in aggravation: (1) that defendant expected to receive compensation for committing the offenses; and (2) that defendant's criminal conduct threatened serious harm. Defendant argues that these factors were inherent in his offenses and therefore cannot be considered as factors in aggravation.

¶ 26 Typically, to preserve a claim of sentencing error, a defendant must both make a contemporaneous objection and raise the issue in a posttrial motion. *People v. Hillier*, 237 Ill. 2d 539 (2010). We may forgive a defendant for not interrupting the court with an objection during sentencing (*People v. Martin*, 119 Ill. 2d 453 (1988)); however, a posttrial motion is always necessary. In the present case, defendant neither made a contemporaneous objection nor raised this issue in a posttrial motion. Therefore, we review it under the plain error doctrine. The first step in a plain error analysis is to determine whether error occurred at all. *People v. Thompson*, 238 Ill. 2d 598 (2010)

¶ 27 A trial court's consideration of an improper sentencing factor is an abuse of discretion. *People v. McAfee*, 332 Ill. App. 3d 1091 (2002). A sentence based on an improper factor will be vacated unless the record establishes that the consideration of the improper factor did not cause defendant to receive a greater sentence. *People v. Heider*, 231 Ill. 2d 1 (2008). We determine *de*

novo whether the trial court considered an improper sentencing factor. *People v. Abdelhadi*, 2012 IL App (2d) 111053. Generally, a factor implicit in the offense for which a defendant is convicted cannot be used as a factor in aggravation during sentencing. *People v. Ferguson*, 132 Ill. 2d 86 (1989).

¶ 28 That fact that defendant received compensation is a factor inherent in the crime of possession with intent to deliver and, therefore, may not be considered as a factor in aggravation. *People v. Smith*, 198 Ill. App. 3d 695 (1990). However, a court "may properly consider a defendant's efforts to maximize profits from a drug enterprise in sentencing for unlawful possession, to the extent that such evidence reflects on the nature of the crime." *People v. M.I.D.*, 324 Ill. App. 3d 156, 159-60 (2001).

¶ 29 In the present case, the court said the following in regard to the compensation factor:

"No. 2, that the defendant received compensation for committing the offense, and the Court is—even though the—the drugs were found the—the large quantity of drugs that were found indicates and suggests that this was all for compensation and it wasn't for personal use. So I believe it's appropriate that you had an expectation of receiving compensation for committing the offense."

It is clear from the court's language that it was not considering defendant's efforts to maximize profits, but rather, was considering defendant's intent to deliver the narcotics for compensation as opposed to keeping them for personal use. The expectation of compensation considered by the court was inherent in the offense, and the court should not have considered it.

¶ 30 However, the error rises to an abuse of discretion only if the factor affected the sentence fashioned by the court. *Heider*, 231 Ill. 2d 1. In the present case we find that it did not. After noting

the four aggravating factors that applied to defendant's offense, the court noted that it placed particular weight on the harm and deterrence factors:

"[T]hose factors are more important than [sic] others. A lot of 'em just simply fit in almost any offense that we deal with, but two of them are more important under these circumstances."

The court therefore placed such little weight on the compensation factor that it did not result in an abuse of discretion.

¶ 31 Next, defendant challenges the court's reliance on the aggravating factor that defendant's conduct caused or threatened serious harm. 730 ILCS 5/5-5-3.2(a)(1) (West 2008). The potential danger posed by drugs to society in general is inherent in the offense of possession with intent to deliver. *People v. Robinson*, 391 Ill. App. 3d 822 (2009). However, this does not mean that harm to society can never be considered as an aggravating factor in such a case. A court may consider the specific degree of harm caused by a particular offense. *Id.*; *People v. Saldivar*, 113 Ill. 2d 256 (1986).

¶ 32 At the sentencing hearing, the court stated:

"And No. 1, that the defendant's conduct caused or threatened serious harm is also important because in—in all of the years that I've spent in Knox County and in the ninth circuit as a Judge, every single offense, criminal offense that I've seen *** all involve drugs or alcohol or substance—some substance abuse. Most often it's drugs. And so to suggest that drugs are not a serious problem in this community would be wrong.

Being a drug dealer, which you are and have been for a considerable period of time—of time in your life, has threatened and caused serious harm in the community."

The court considered harm as it applied to society in general, not to the specific degree of harm

caused by defendant's crime; it thereby improperly relied on a factor inherent in the offense. The court noted that it relied on this factor in particular when issuing a sentence. As a result, the court abused its discretion in relying on a factor that was inherent in the offense.

¶ 33 We must now determine whether the error meets either prong of the plain error test. Under the plain error doctrine, we will forgive a defendant's failure to preserve a sentencing error if either: (1) the evidence at the sentencing hearing was closely balanced; or (2) the error was so egregious as to deny the defendant a fair trial. *Hillier*, 237 Ill. 2d 539. We find that neither prong has been met in the present case.

¶ 34 For an error to meet the second prong of plain error, it must be so serious that consideration of the error is " 'necessary to preserve the integrity and reputation of the judicial process.' " *People v. Hampton*, 149 Ill. 2d 71, 102 (1992) (quoting *People v. Herrett*, 137 Ill. 2d 195, 214 (1990)). The court's consideration of the inherent harm factor did not rise to such a level where the court relied on other aggravating factors in determining a sentence. See *People v. Baker*, 341 Ill. App. 3d 1083 (2003). Nor was the evidence closely balanced. The court considered a total of four factors in aggravation when imposing defendant's sentence. Therefore, there was more than enough evidence provided at sentencing to justify the court's imposition of a sentence in the middle of the sentencing range.

¶ 35 CONCLUSION

¶ 36 The judgment of the circuit court of Knox County is affirmed.

¶ 37 Affirmed.